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Environmental Legal Services

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Cambria District Mining Office
District Mining Operations
Department of Environmental Protection
Commonwealth of Pennsylvania
Attn: Daniel Sammarco, P.E., District Mining Manager
Rock Martin, P.G., Permit Chief
286 Industrial Park Road
Ebensburg, Pennsylvania 15931

**RE: Comment on Large Surface Mining Permit No. 01180301 and NPDES No. PA0279617, Specialty Granules, LLC
Submitted on behalf of Friends of Tom's Creek
Noticed in 48 Pa. B. 885 (Feb. 10, 2018)**

Dear Messrs. Sammarco and Martin:

On behalf of Friends of Tom's Creek ("FOTC"), I respectfully submit the following comment on Specialty Granules, LLC's ("SGI") application for a Noncoal Surface Mining Permit No. 01180301 and NPDES No. PA0279617 ("Application") for noncoal surface mining on Pine Hill in Hamiltonban Township, Adams County, referred to by the Applicant as the "Northern Tract." Upper Potomac Riverkeeper supports and signs on to this comment.

Pursuant to e-mail correspondence with Mr. Rock Martin, the Department will accept comments pertaining to the application materials until August 6, 2018, or two weeks following the July 23, 2018 public hearing. Accordingly, this comment is timely filed.

As a preliminary matter, and to avoid unnecessary repetition throughout this comment, in addition to the applicable statutory and regulatory requirements for the issuance of a noncoal surface mining permit, the Department must also ensure

compliance with the Pennsylvania Constitution. Article I, Section 27 of the Pennsylvania Constitution (“Environmental Rights Amendment”) reads:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. ART. I, § 27.

The people’s fundamental, human right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment may not be unreasonably degraded by either direct state action or the action of third parties. *See Pa. Env’tl. Defense Found. v. Com.*, 161 A.3d 911, 933 (Pa. 2017); *Center for Coalfield Justice, et al. v. DEP, et al.*, Dkt. No. 2014-072-B, 2017 Pa. Environ. LEXIS 52 (Pa. Env. Hrg. Bd. Aug. 15, 2017). Public natural resources that must be protected include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Twp. v. Com.*, 83 A.3d 901, 955-956 (Pa. 2013) (“*Robinson II*”).

As an instrumentality of the Commonwealth, the Department serves as a trustee of the public natural resources protected by the Environmental Rights Amendment and is bound by the fiduciary duties of prudence, impartiality, and loyalty. The duty of prudence requires the Department to “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *Pa. Env’tl. Defense Found.*, 161 A.3d at 931. In order to fulfill the duty of prudence, the Department must engage in pre-action analysis that is capable of informing the agency of (1) whether degradation of the environment, and thus an intrusion into protected rights, is likely to occur as a result of permitted activity and (2) the degree of that intrusion. *See Robinson II*, 83 A.2d at 983, n. 60 (noting that data is needed to assess impact upon public natural resources and describing trust beneficiaries’ right to information necessary to enforce rights or trust limitations); *see also* Kenneth T. Kristl, “The Devil is in the Details,” 28 *Georgetown Env’tl. L. Rev.* 589, 592 (2016) (“[A]ssessments of environmental effects before actions are taken are key to providing the information critical to discharging the constitution’s requirement.”).

The duty of loyalty is owed to both present and future generations and requires that the Department “manage the corpus of the trust so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” *Pa. Envtl. Defense Found.*, 161 A.3d at 933. The duty of impartiality requires “the trustee to manage the trust so as to give all the beneficiaries due regard for their respective interests in light of the purposes of the trust.” *Id.*

With these constitutional requirements in mind, in addition to applicable statutory and regulatory requirements, the Department should deny the Application and return the Application to SGI because it does not pass constitutional scrutiny or meet the criteria for permit approval. There are numerous legal, technical and procedural deficiencies, which are identified below. In the event that SGI submits a revised application, the significance of the revisions merits a second public comment period.

I. Public Notice of the Application and Public Hearing Were Inadequate to Ensure Actual Notification of the Proposal Surface Mine to Interested Parties

Both 25 Pa. Code § 77.121 (public notices of filing of permit applications) and 25 Pa. Code § 77.123 (public hearings – informal conferences) require that notice of a proposed noncoal surface mine and a public hearing regarding the same be published in a “newspaper of general circulation in the locality of the proposed mine.” 25 Pa. Code § 77.123(b)(2). Following newspaper publication of the filing of a permit application, the Department is further required to provide notice of the application in the Pennsylvania Bulletin. 25 Pa. Code § 77.121(d).

As the Department is well aware, the general public does not regularly peruse the Pennsylvania Bulletin. For all practical purposes, newspaper publication is the only legally required means of notifying the public of mining projects that will significantly impact quality of life for neighboring property owners and community members. Accordingly, it is crucially important that not only is the selected newspaper one that interested parties read but also that the information provided allows the public to understand the nature of the proposed mining project.

The locality of proposed mine in this matter includes both Adams County and Franklin County. While the proposed mine will be located within Adams County, many business owners, property owners, and residents of Franklin County are located within close proximity to the proposed Northern Tract and will be greatly impacted by its development, should the proposal be approved.

SGI and the Department published notice of the application and the public hearing for July 23, 2018 in the Gettysburg Times. While residents of Adams County regularly read the Gettysburg Times, residents of Franklin County rely upon the Record Herald. Accordingly, for residents of Franklin County, the Gettysburg Times is not a newspaper of general circulation. When considering whether a newspaper selected for public notification qualifies as one of general circulation in the locality of the proposed mine, the Environmental Hearing Board considers the likelihood of the notice actually reaching residents near the proposed site. See, e.g., *Snyder Twp. Residents for Adequate Water Supplies v. DEP*, Dkt No. 85-022-G, 1988 Pa. Environ. LEXIS 189 (Pa. Env. Hrg. Bd. Dec. 12, 1988). As residents of Franklin County do not rely upon the Gettysburg Times, there is very low likelihood that notice published in that newspaper reached Franklin County residents.

To alleviate this error, Friends of Tom's Creek expended considerable funds and time by sending postcards to individuals in both Franklin and Adams County to ensure that actual notice was provided to the local community. While Friends of Tom's Creek voluntarily undertook this endeavor, the responsibility of public notice is statutorily entrusted to the applicant and the Department.

II. Proposed Protection of Identified Endangered Plant *Trillium cernuum* (Nodding Trillium) is Insufficient to Ensure Protection of the Plant Species

Pursuant to 25 Pa. Code § 77.126(a)(10), a permit application may not be approved for noncoal surface mining activities unless the applicant affirmatively demonstrates that "[t]he proposed activities [will] not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their known critical habitats . . .". Additionally, the Department must fulfill its responsibilities pursuant to the Environmental Rights Amendment to ensure that unreasonable degradation to environmental resources, particularly threatened and endangered species, does not occur. In order to assess whether unreasonable degradation will occur, the Department must quantify the anticipated impact.

According to the Skelly & Loy, Inc. August 25, 2016 report provided within the Application, a significant number of *Trillium cernuum*, or nodding trillium, was found along the eastern and northern portions of the Northern Tract parcel. Nodding trillium is an endangered plant species in Pennsylvania that requires patchy sunlight and will not survive in full, direct sun. The plants found at the Northern Tract are particularly important, as the nodding trillium population at that location is "the largest known in the state." Greg Podniesinski, Section Chief of PA Bureau of Forestry, to Andrew Nevin, Skelly and Loy, Inc. (Sept. 22, 2016).

The nodding trillium found within the permit boundaries exist in both the “operational buffer,” where quarry related activities such as access roads and stormwater management will occur, and the “maintained buffer,” which will remain forested. Eighteen individual plants will be destroyed, as they fall within the “operational buffer.” A significant number of nodding trillium is located on the border between the operational and maintained buffers. These plants are likely to be exposed to direct sunlight and, thus, unable to survive. While the Department of Conservation and Natural Resources has requested a fence be put in place along the border of the operational and maintained buffers to avoid construction crews from directly damaging or destroying nodding trillium, the fence will not provide the needed shade for the plants along the buffer lines. SGI’s application materials do not quantify the anticipated number of nodding trillium likely to be adversely impacted as a result of loss of habitat, meaning that the degree of degradation is not known.

In order to comply with the Department’s duty of prudence pursuant to the Environmental Rights Amendment and 25 Pa. Code § 77.126(a)(10), the Department must require enough information in the application materials to assess the degree of degradation. SGI’s current application fails to affirmatively demonstrate that its proposed mining will not result in the destruction of critical habitat. Considering that the Northern Tract area is critical habitat within Pennsylvania for nodding trillium, the Department should further require additional protections for the nodding trillium found between the maintained and operations buffer, such as increasing the maintained buffer, to ensure adequate habitat for the endangered plant.

III. SGI’s Application Must be Denied Because SGI’s Socio-Economic Justification was Approved without Public Participation and SGI Failed to Properly Assess Impacts to Tom’s Creek as a Result of Proposed Discharges

SGI’s NPDES application proposes discharging into Tom’s Creek and unnamed tributaries of Tom’s Creek. As the Department is aware, Tom’s Creek is designated as High Quality, Cold Water Fishes and Migratory Fishes (HQ-CWF-MF). 25 Pa. Code § 93.9z.

Pennsylvania’s Anti-Degradation Policy requires that nondischarge alternatives be evaluated prior to any new, additional, or increased discharge to a High Quality stream. In the event that the applicant demonstrates that an environmentally sound and cost-effective nondischarge alternative cannot be utilized, the applicant must demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters. *Id.* at § 93.4c(b)(1)(i)(A)-(B). Water quality of a High Quality

water may only be reduced if, “after full satisfaction of the intergovernmental coordination and *public participation provisions* of the Commonwealth’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” *Id.* at § 93.4c(b)(1)(iii) (emphasis added).

SGI has proposed not only discharging into Tom’s Creek and its unnamed tributaries, but also lowering the water quality of Tom’s Creek, as SGI has submitted a Social or Economic Justification (“SEJ”) form as part of Module 24. The Department’s May 18, 2018 review letter to SGI regarding the Northern Tract application states that, “[i]t should be noted that the operator can discharge from these ponds since Specialty Granules, LLC submitted an Anti-Degradation Supplement for Mining Permits *and their Social or Economic Justification (SEJ) was approved.*” Chad Paronish, DEP Geologic Specialist, to Matthew McClure, Director EHB and Mining Permit (May 18, 2018) at p. 2. Accordingly, it appears that the Department has already approved the SEJ and authorized discharges into Tom’s Creek and its unnamed tributaries. However, there does not appear to have been any public notice or acceptance of public comment on the SEJ prior to its approval, as required by § 93.4c. When the Department is required to accept public comment, it must consider public comments received and make appropriate changes prior to making a decision. *See Pa. Water Industries Ass’n v. DEP*, 2016 EHB 590, 637-38. To do otherwise renders public comments ineffectual. Accordingly, the Department must provide for an additional comment period to allow for full public participation prior to accepting SGI’s SEJ.

Additionally, anticipated impacts to Tom’s Creek have not been adequately evaluated. SGI proposes constructing two ponds capable of holding stormwater equivalent to a 100-year/24 hour storm event, which will then be pumped to ponds at the Charmian Quarry and discharged into Miney Branch. Notably, storms once considered extreme and unusual are occurring on a much more frequent basis. *See Tim Craig & Angela Fritz, Extreme Weather: Massive Rains are Causing More Flash Flooding, and Experts Say It’s Getting Worse*, WASH. POST. (June 24, 2018). The Pennsylvania Department of Conservation and Natural Resources (“DCNR”) has noted, “Pennsylvania has seen measurable changes in temperature, precipitation, and storm intensity.” *PA DCNR Climate Change Adaptation and Mitigation Plan* (June 2018) at 4. Specifically, “[p]recipitation has increased about 10 percent over the past 100 years, and heavy precipitation events also have increased significantly . . . precipitation is expected to increase by 8 percent annually and by an additional 14 percent during the winter.” *Id.* As a result of increased storms due to climate change, DCNR plans to reevaluate 50-year, 100-year, and 500-year flood trends. *Id.* at 9. While SGI dismissed

the likelihood of a 100-year storm event or the chances of smaller storms occurring over the course of several days, such events are becoming increasingly common.

While SGI characterizes discharges into Tom's Creek and its tributaries as "extremely rare," such discharges may occur on a more regular basis, and anticipated impacts have not been fully scrutinized. First, SGI's application materials do not provide baseline data for Tom's Creek and its tributaries. Without baseline data, neither the Department, SGI, nor the public is able to evaluate whether proposed discharges will degrade the quality of Tom's Creek. Second, SGI's proposed monitoring plan is insufficient. While SGI proposes to analyze monitoring samples for some pollutants, important pollutants specific to SGI's operations are not included. To properly monitor the unique impacts that SGI's operations may have on Tom's Creek, water sampling must also include analysis for asbestos and any chemicals or fungicides used on site. Otherwise, impacts as a result of SGI's operations will go undetected.

Additionally, SGI's permit application materials fail to adequately address whether the proposed mining project is likely to result in loss of flow to Tom's Creek or its unnamed tributaries. According to SGI's groundwater assessment (Module 8), there is very little hydrologic communication between surface and groundwater within the permit boundary. By SGI's own evaluation, most wetlands and surface waters are primarily fed by storm events. Module 8.3 (p. 8-9). Currently, Tom's Creek and its unnamed tributaries are surrounded on all sides by mature forest. Should the Northern Tract be developed for mining, Pine Hill will become barren landscape, save for a 300 foot buffer from the center line of Tom's Creek and a 150 foot buffer from the center line of unnamed tributaries to Tom's Creek.¹ Additionally, all runoff from this barren landscape will be directed to SGI's 100-year/24 hour detention basin. While holding basins are necessary to protect surface waters from sedimentation, it also appears that SGI's mining proposal will significantly impact the amount of surface water that Tom's Creek currently receives, possibly resulting in the loss of flow.

As noted in *Crum Creek Neighbors v. DEP*, "[t]he principle that degrading a stream by materially changing its movement, circulation, or flow is prohibited has been repeated in numerous other cases and it is now beyond dispute." Dkt. No. 2007-287-L, 2009 Pa. Environ. LEXIS 52 at *30 (Pa. Env. Hrg. Bd. Oct. 22, 2009). "A permittee may not degrade a stream by altering its physical or biological properties any more than it may degrade a stream by the direct discharge of pollutants." *Id.* SGI's failure to quantify the potential for loss of flow to Tom's Creek is a critical oversight. The Department cannot

¹ Notably, SGI points the Department of Exhibit 9 to depict the 300 and 150-foot buffers around Tom's Creek and its unnamed tributaries. Yet, Exhibit 9 only includes a 100-foot buffer around Tom's Creek and associated tributaries.

evaluate whether Tom's Creek will continue to support existing uses without this information, and, therefore, cannot ensure that Tom's Creek will not be degraded. The Department's duty of prudence requires a more thorough analysis of potential impacts to Tom's Creek, particularly as Tom's Creek is a high quality stream.

Finally, it is significant that SGI proposes transferring all water (less than a 24 hour/100 year storm event) collected in the Northern Tract ponds to the Charmian Quarry to be discharged through NPDES No. PA0009059, which authorizes discharges into Miney Branch. Prior to authorizing the current NPDES permit, the Department must evaluate potential impacts to Miney Branch as a result of the additional water to be redirected from the Northern Tract. Not only will the discharges from the Northern Tract increase the quantity of water ultimately discharged into Miney Branch but may also change the quality of the discharged water. The Department must ensure that Outfall 001, under PA0009059, has the capacity to store and properly treat stormwater, as the SGI ponds have a history of overflowing, resulting in untreated, polluted discharges. Authorizing the transfer of water from the Northern Tract to Miney Branch prior to analyzing the potential environmental degradation to Miney Branch puts the cart before the horse. Only once the Department is satisfied that Miney Branch will not be unreasonably degraded as a result of increased discharges from the Northern Tract may the Northern Tract be permitted to transfer its stormwater discharges. Accordingly, Friends of Tom's Creek strongly urges the Department to evaluate impacts to Miney Branch prior to taking action on NPDES Application No. PA0279617.

IV. SGI's Archeological Review is Insufficient as it Failed to Address Impacts to Significant Civil War Historical Sites

Article I, Section 27 of the Pennsylvania Constitution protects not only the people's right to clean air and pure water but also the preservation of historic values of the environment. In order to comply with the Department's fiduciary duty of prudence, the Department must fully evaluate whether its permitting decisions will adversely impact historical resources and the extent of that impact. While the Department may ordinarily defer to the findings of a more specialized agency, the sister agency must have evaluated the historical resource that could be impacted. Where, as here, there was no evaluation of a particular historical resource, the Department must assess whether further investigation or consultation with a sister agency is warranted.

SGI's archeological evaluation does not address the impact of mining operations on Pine Hill upon the Confederate Army's retreat path following the Battle of Gettysburg ("Retreat from Gettysburg"). It is well documented that following the Battle of Gettysburg, the Confederate Army retreated to Virginia following two routes: the

first through Cashtown (northwest of Gettysburg) and the second through Franklin (southwest of Gettysburg). The second route through Franklin brought the Confederate soldiers through Hamiltonban Township, around Pine Hill. In Hamiltonban Township, Confederate soldiers retreated following what are now named Iron Springs Road, Lower Gum Springs Road, and Gum Springs Road – all following Tom’s Creek and wrapping around Pine Hill. The Retreat from Gettysburg is a significant historical resource in the area that is eligible for listing on the National Register of Historical Places. See, e.g., Multiple Properties Nomination to the National Register of Historic Places, Adams County, Pennsylvania for Properties Associated with the Battle of Gettysburg, July 1-3, 1863, certified by the Pennsylvania Historical and Museum Commission, April 11, 2000, and the Keeper of the National Register, May 18, 2000 (nomination *available at* https://npgallery.nps.gov/NRHP/GetAsset/NRHP/64500520_text).

Yet, SGI’s archeological evaluation does not even acknowledge that this significant historical resource is within the permit boundary or is likely to be impacted by surface mining. Surface mining of Pine Hill will significantly impact the Retreat from Gettysburg, as it will fundamentally alter the surrounding environment. Whereas the retreat route follows Tom’s Creek through a pass between two mountains, SGI’s mining operations will essentially remove one mountain, thereby eliminating the pass and permanently degrading the historical and esthetic value of the area.

Further, significant battles occurred during the Retreat from Gettysburg, and battles or encampments are likely to have occurred within SGI’s permit boundary. According to the Pennsylvania State Historic Preservation Office’s *Guidelines for Archaeological Investigations in Pennsylvania* (“*Guidelines*”), “research specific to military activities within the project area should be conducted when the project may be the location of a military site. Information on the larger military campaign placing the battle or encampment in its local, regional, or national context should also be undertaken.” *Guidelines* at 13. There is no indication within SGI’s application materials that specific research into potential military activities was conducted. Furthermore, the Pennsylvania State Historic Preservation Office notes that “[f]or area of military action, such as a battlefield (the core battle area) and/or encampment sites, *metal detector survey should be used in all circumstances as it has been found that standard site identification methods, such as shovel testing, are not adequate for location of these types of sites.*” (emphasis added). *Guidelines* at 19. SGI’s archeological assessment does not reference the use of metal detectors.

SGI’s archeological survey further did not assess the full permit site to determine whether significant archaeological or historical resources exist. Rather, the

archaeological assessment was limited to exploration of former copper mines, as they are recorded in historical maps, and an assessment of a potential schoolhouse on the property, based on informant interviews. However, an extensive site investigation was not conducted to visually assess whether other significant historical resources, such as cemeteries or structures, exist within the permit boundary. As the *Guidelines* note, “there is no substitute for a detailed field examination . . .” *Guidelines* at 9, as not all historical resources will be previously recorded.

As SGI’s application materials fail to properly evaluate the historical value of Pine Hill and immediately surrounding area, the Department should deny the application. In addition, Friends of Tom’s Creek strongly urges the Department to require an independent archaeological assessment of the permit site and/or engage in further consultation with the Pennsylvania Historical and Museum Commission to fully assess the impact upon important historical resources.

V. The Application Must be Denied as Anticipated Noise Impacts Have Not Been Properly Evaluated by the Applicant

Pursuant to 71 P.S. § 510-17(1)-(3), the Department has both the power and the duty to protect the people of the Commonwealth from nuisances. The Environmental Hearing Board has consistently held that the Department commits an abuse of discretion when it does not consider noise generated by a surface mine and fails to determine whether that noise constitutes a public nuisance. See *Chimel, et al. v. DEP, et al.*, Dkt. No. 2011-033-M, 2014 Pa. Environ. LEXIS 65 (Pa. Env. Hrg. Bd. Nov. 25, 2014); see also, *Plumstead Township v. DER*, 1995 EHB 741, 789. Although “there are no applicable statutory or regulatory standards that limit the operational noise from a surface coal mine or quarry . . . the Department nevertheless has the clear duty to consider noise impacts when reviewing an application . . . to ensure that the Department does not permit an operation that constitutes a public nuisance.” *Chimel*, 2014 Pa. Environ. LEXIS at *69. Accordingly, the Department must not simply evaluate anticipated noise impacts but must also deny a permit application when the noise to be generated would constitute a public nuisance. *Id.* at *70. In *Chimel*, the EHB noted that the Department considers “a continuous reading of over 68 decibels during the day and over 65 decibels at night at the property line to be a public nuisance.” *Id.* at *81.

Further, in order to fulfill the Department’s duty of prudence pursuant to the Environmental Rights Amendment, the Department must require enough information from the applicant to assess whether the mining operation will constitute a nuisance for neighboring property owners. The Environmental Rights Amendment mandates the preservation of esthetic values of the environment, which includes the peaceful and

quiet atmosphere that residents are currently accustomed to. An adequate noise assessment should evaluate anticipated day and nighttime decibel levels at the property line, when spikes in noise levels are anticipated, what measures SGI will or could take to reduce noise impacts, and the noise environment that local residents are currently accustomed to.

Noise impacts are particularly salient to SGI's permit application, as it is well known that SGI's current mining operations at the Charmian and Pitts Quarries are extremely loud and bothersome to neighboring property owners. Members of Friends of Tom's Creek living close to SGI's current operations have reported being kept awake throughout the night, and members living over two miles from the current operations report being able to hear the operations throughout the day. Noise levels at the Northern Tract are likely to be similar, and, therefore, have the potential to constitute a public nuisance. More so, the Northern Tract would bring SGI's mining operations closer to residential property where residents and property owners are currently accustomed to a quiet, rural environment – not the noises from industrial operations.

Unfortunately, the information provided in SGI's application materials is inadequate to allow the Department to assess whether SGI's operations will constitute a public nuisance. Notably, SGI did not identify or provide:

- Major noise sources to be utilized at the Northern Tract;
- Noise associated with truck traffic;
- Anticipated hours of operation for major noise sources;
- Anticipated day and nighttime decibel levels at the property line; or
- Current, ambient noise levels²

Although SGI asserts that “[v]egetated screenings” will be used to “help mitigate noise levels,” *see* Module 17.3, SGI does not even attempt to quantify the noise reduction that can be attributed to the vegetated screenings or identify where these screenings will be located. SGI's Blast Plan, contained in Module 16, notes that buffers of anywhere between 100 to 300 feet of “forestland” will be utilized; however, there is no information on the location of this forested buffer or where the buffer will be 100 feet versus 300 feet. Although SGI points to Exhibit 9 for mapping, the map provided as Exhibit 9 does not depict a forested buffer.

² The foregoing are provided as examples of critical information needed for the Department's assessment of noise impacts resulting from SGI's operations at the Northern Tract. The foregoing is not intended to be a comprehensive list of necessary information for the Department to conduct a proper noise analysis.

SGI further asserts that it will “use best management practices and blasting plans to minimize noise levels (over pressure) associated with blasting,” *see* Module 17.3. Yet, again, SGI does not identify what best management practices will be utilized or what decibel reduction can be expected as a result.

Not only do the application materials fail to quantify anticipated noise levels, but also the application materials do not provide current noise levels. Without this information, it is impossible for the applicant, the Department, or the public to determine whether the noise from the Northern Tract will create a public nuisance. Aside from a conclusory assertion that SGI’s blasting will comply with 25 Pa Code Chapter 211.151(c), the Department has not been provided with any other information regarding anticipated noise levels and the impact to the surrounding community. Based on the information provided in the present Application, the Department is unable to fulfill its obligation under 71 P.S. § 510-17(1)-(3) and Article I, Section 27. Accordingly, the Application should be denied.

VI. The Application Must be Denied because Air Pollution as a Result of Naturally Occurring Asbestos Has Not Been Properly Evaluated

In addition to anticipated noise impacts, Module 17 of the Application also addresses air pollution concerns as a result of the mining activity. As discussed above, the Department has a constitutional responsibility to ensure that the people’s right to clean air is not unreasonably degraded. Pa. Const. Art. I, § 27. At times, the Department may be required to go above and beyond statutory and regulatory requirements to ensure that unreasonable degradation does not occur. As noted in *Center for Coalfield Justice, et al. v. DEP, et al.*, treating the Article I, Section 27 Constitutional standard as coextensive with compliance with statutes and regulations was “clearly rejected” by the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation*. 2017 Pa. Environ. LEXIS 52 at *62. Accordingly, an evaluation of anticipated degradation to air quality may include the consideration of air pollutants that are not specifically regulated, but may have an adverse impact the people’s right to clean air.

The Department’s thorough analysis of anticipated air quality impacts is particularly important in this Application, as SGI indicates in Module 17 that an Air Quality General Permit for Portable Nonmetallic Mineral Processing Plants is “not applicable.” Accordingly, the only evaluation of air pollution concerns occurring at the Northern Tract would appear to be based on the information supplied in Module 17.

Unfortunately, SGI's Application fails to address the release of and exposure to naturally occurring asbestos ("NOA") as a result of mining for metabasalt. NOA occurs in "[m]etamorphosed mafic extrusive rocks, *especially* metabasalt (greenstone). . . ." and is "linked to a number of serious respiratory diseases and health problems . . . such as asbestosis (scarring of the lungs), lung cancer, and malignant mesothelioma." Bradley S. Van Gosen, *The Geology of Asbestos in the United States and Its Practical Applications*, Environmental & Engineering Geoscience, Vol. XIII, No. 1 (Feb. 2007) at 56, 57 (emphasis added). NOA is an air pollutant with the potential to drastically degrade the people's right to clean air, as it will be carried off site through dust in the ambient air, on trucks, and workers' clothing. As a result of the likely degradation of air quality, NOA must be evaluated by the Department prior to authorizing surface mining activities.

SGI's failure to address NOA hinders the Department from fulfilling its responsibilities pursuant to the Environmental Rights Amendment. As a result, the Department must deny the Application, or, in the alternative, require release and exposure estimates of NOA to allow the Department to evaluate and quantify the anticipated impact upon ambient air quality.

VII. SGI's Reclamation Plan is Incomplete and Does Not Demonstrate Compliance with the Noncoal Surface Mining Conservation and Reclamation Act and its Implementing Regulations

Pursuant to 52 P.S. § 3307(c), each application for a noncoal surface mining operation must include a "complete and detailed plan for the reclamation of the land affected." The reclamation plan must include a "detailed timetable for the accomplishment of each major step in the reclamation plan" as well as the estimated cost for each step and "total cost to the operator." *Id.* at § 3307(c)(5). The Pennsylvania Code further requires that reclamation procedures, to the greatest extent possible, occur concurrently with the progression of the proposed operation. 25 Pa. Code § 77.595(a).

SGI's application materials do not provide a timetable for each step of reclamation, estimated costs of reclamation, or a demonstration that reclamation will occur concurrently with the progression of the mining operation. In light of the longevity of the proposed operation and the reclamation status of other SGI in the same area, the Department must particularly scrutinize reclamation plans.

First, SGI estimates that the Northern Tract will be in operation for anywhere from 25 to 50 years, "depending on market demand." Module 20.3(b). Unless the Department requires concurrent reclamation, as is required by law, many surrounding

residents will never see reclamation of Pine Hill. Second, SGI-owned quarries adjacent to the proposed Northern Tract remain un-reclaimed years after mining has been completed. SGI proposes stockpiling overburden soils from the Northern Tract in “abandoned portions of the Pitts Quarry” as “an efficient method to incrementally reclaim an area adjacent to the Northern Tract Quarry.” *Id.* Yet, SGI does not acknowledge that mining in portions of the Pitts Quarry concluded by 1996 and *remain* un-reclaimed. Without a clear timetable for reclamation of the Northern Tract, the Department and the public have no assurances that reclamation will occur.

Further, even should SGI successfully complete reclamation of Pine Hill, SGI has not proposed a higher or better land use for the mining area. Where an applicant proposes restoring the parcel to something other than the approximate original contour, as is the case here, the applicant must demonstrate that the reclaimed land will be capable of supporting higher or better land uses than current. “A higher or better use is a post-mining land use where the economic value or nonmonetary benefit to the landowner or the community *is greater than for the pre-mining land use.*” Module 20.2. Here, SGI has proposed restoring Pine Hill to its current use: forested habitat for wildlife. This does not qualify as a “higher or better” land use because *the proposed land use is the same* as the current land use. SGI suggests that “an unmanaged water impoundment” could provide “recreational opportunities” such as fishing or boating; yet, SGI does not acknowledge that the water impoundment would be located on its own private property or commit to opening its private property to community use for these recreational activities. Further, the application lacks documentary support that the water impoundment will not contain toxic sediment and residual particulates rendering the water incapable of supporting fishing or boating.

Due to the clear deficiencies in SGI’s reclamation plans, the Department must deny the application and return it to SGI.

VIII. Conclusion

In conclusion, SGI’s Application is severely flawed, and the Department should deny the Application and return it to SGI. If the Application is not returned, the Department must issue the necessary deficiency letter to SGI in light of this comment and its own evaluation. Due to the significant revisions that would be necessary, the Department should make available for a second public comment period the next version of the Application.

Respectfully submitted,

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